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In the Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 1354.

CHARLES F. KRAUSE, ADMINISTRATOR, D.B.N., C.T.A. OF THE ESTATE OF LARRY L. GOLDSTEIN, DECEASED,
Petitioner,
v.
LUCIEN ANDRE CHARTIER, NORTH CENTRAL AIRWAYS, INC., AND ELVIRA PETTERUTTI, ADMINISTRATRIX OF THE ESTATE OF PASCO A. PETTERUTTI,
Respondents.

BRIEF OF LUCIEN ANDRE CHARTIER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Table of Contents.

Statement of the case	1
Questions presented	3
Argument	3
Point I. The Court of Appeals applied the Rhode Island law of assumed risk to the facts before it and in doing so violated no constitutional or statutory provision	3
Point II. The petitioner, who claimed no actual prejudice to him from the manner of summoning the jurors or in the order in which jurors were called for impanelling, failed to sustain the burden of proving discriminatory practices in the selection of the jury by a method which has now been discontinued	8
Conclusion	11
Prayer	11

Table of Authorities Cited.

Cases.

Ballard v. United States, 329 U.S. 187	8, 10
Connecticut General Life Insurance Co. v. Breslin, 332 F. 2d 928	5
Crawford v. Bounds, 395 F. 2d 297	10
Glasser v. United States, 315 U.S. 60	10
Henderson Co. v. Thompson, 300 U.S. 258	6
Jamaica Time Petroleum, Inc. v. Federal Insurance Co., 366 F. 2d 156, cert. den. 385 U.S. 1024	6
James v. Rhode Island Auditorium, 60 R.I. 405, 199 Atl. 293	4

Lee Shops, Inc. v. Schatten-Cypress Co., 350 F. 2d 12, cert. den. 382 U.S. 980 6

Necaise v. Chrysler Corp., 335 F. 2d 562 5

Pastorelli v. Associated Engineers, Inc., 176 F. Supp. 159 5

Russo v. Merck & Co., Inc., 138 F. Supp. 147 5

Schiano v. McCarthy Freight System, 75 R.I. 253, 65 A. 2d 462 4

Shine v. Wujick, 89 R.I. 22, 150 A. 2d 1 5

Swain v. Alabama, 380 U.S. 202 8

Thiel v. Southern Pacific Co., 328 U.S. 217 8, 10

United States v. Johnson, 288 F. 2d 40 7

Venuto v. Robinson, 118 F. 2d 679, cert. den. C. A. Ross, Agent, Inc. v. Venuto, 314 U.S. 627 5

Ware v. United States, 356 F. 2d 787, cert. den. 383 U.S. 919 8

Whitus v. Georgia, 385 U.S. 545 8

Williams v. Tillett Brothers Construction Co., Inc., 319 F. 2d 300, cert. den. 375 U.S. 888, reh. den. 375 U.S. 949 6

Witherspoon v. Illinois, 391 U.S. 510 8

STATUTES, ETC.

28 U.S.C. §§ 1861-1865 9, 10

Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53 10

Rules of the Supreme Court of the United States, Rule 24 1

In the Supreme Court of the United States.

October Term, 1968.

No. 1354.

CHARLES F. KRAUSE, Administrator, D.B.N., C.T.A. of the Estate of Larry L. Goldstein, Deceased,
Petitioner,
v.
LUCIEN ANDRE CHARTIER, NORTH CENTRAL AIRWAYS, INC., and ELVIRA PETTERUTTI, Administratrix of the Estate of Pasco A. Petterutti,
Respondents.

BRIEF OF LUCIEN ANDRE CHARTIER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lucien Andre Chartier opposes issuance of the writ of certiorari for which petitioner has prayed and, pursuant to Rule 24, respectfully submits this, his brief in opposition.

Statement of the Case.

The respondent Chartier submits the following facts for consideration in addition to those stated at pages four to ten of petitioner's brief:

While Chartier was in the Norwich area en route to the Theodore Francis Green Airport at 2309:30 (6:09.30″) he

was given a change in altitude from 2,000 feet to 3,000 feet where he leveled off. After a short time he noticed a change in the reading of the altimeter which showed that he gained some altitude where he should not have. The altimeter, which shows how high the plane is above sea level, responds promptly to changes in altitude and under the conditions should not have shown any change after he leveled off (538a-539a).

Chartier was examined by a neuropsychiatrist under a hypnotic drug, sodium amytol, and was found to have suffered a physical loss of memory for events during fifteen minutes before the crash (retrograde amnesia) and for two weeks thereafter (anterograde amnesia). The retrograde amnesia resulting from concussion caused him to remember nothing about the operation of the plane from the time he left Norwich. He had no memory of what he did to control the plane or what various instruments, including the altimeter, showed (540a). The pilot did not know why the plane crashed (542a).

The pilot's decision to land or execute a missed approach is made when he reaches a point on the glide slope called the minimum decision altitude which at Theodore Francis Green Airport was 300 feet above the ground and about 3600 feet from the end of the runway (595a). The crash occurred at a point about halfway between the end of the runway and the outer marker, about 3½ miles from the end of the runway, not as petitioner states while the pilot was "attempting to land" (606a). Evidence was offered by petitioner that there was a custom or practice of pilots not to start an approach unless the weather reported was above minimums (146a). This was denied by testimony of witnesses called by the respondents (511a, 512a, 513a, 593a, 598a).

Questions Presented.

1. Did the Court of Appeals apply the Rhode Island law of assumed risk to the facts before it?

2. Did the petitioner, who claimed no actual prejudice to him from the manner of summoning the jurors or in the order in which jurors were called for impanelling, fail to sustain the burden of proving discriminatory practices in the selection of the jury by a method which has now been discontinued?

Argument.

POINT I. THE COURT OF APPEALS APPLIED THE RHODE ISLAND LAW OF ASSUMED RISK TO THE FACTS BEFORE IT AND IN DOING SO VIOLATED NO CONSTITUTIONAL OR STATUTORY PROVISION.

When the trial judge instructed the jury on assumption of risk, the language in which the instruction was given was taken word for word from the modern Rhode Island cases on assumption of risk and the form of the instruction was not objected to (673a), in some respects being in the form requested by petitioner. Since the instruction completely and correctly stated the law of Rhode Island on assumption of risk, it can hardly be claimed that the lower court refused to follow Rhode Island law. On the contrary, it is apparent that the trial court interpreted and applied the law of Rhode Island to the facts in evidence.

No precisely controlling decision of the Rhode Island Supreme Court on comparable facts has been found. No case is cited by petitioner in which the Rhode Island Supreme Court has decided that it is prejudicial error for the trial court to instruct the jury correctly on the elements of assumption of risk under Rhode Island law in a case

which is submitted to the jury on one count of specific negligence and one count of res ipsa loquitur. The cases which the petitioner cites are procedurally and factually so dissimilar from this one that they are of value only as a source of the general principles in which the trial court instructed the jury.

The first Rhode Island case on assumption of risk not involving the master and servant relationship is *James* v. *Rhode Island Auditorium,* 60 R.I. 405, 199 Atl. 293 (1938). Defendant's motion to direct a verdict on assumed risk was denied. The jury was given an instruction on assumed risk. In deciding that the trial court had not erred in refusing to direct a verdict against the plaintiff, a spectator at a hockey game who was injured when hit by a puck, the Supreme Court pointed out that plaintiff had never seen a hockey game before and held that "such evidence and the reasonable inferences therefrom presented issues of fact for determination by a jury." 199 Atl., *supra,* at 298.

That plaintiff, it is submitted, was more in the position of the "ignorant passenger" of the Court of Appeals' opinions than that of petitioner's decedent who had some training and experience as a pilot.

In *Schiano* v. *McCarthy Freight System,* 75 R.I. 253, 65 A. 2d 462 (1949), plaintiff relied on specific acts of negligence of the defendant's employee in lifting a heavy weight with plaintiff. The court cited cases which held that "where a co-employee was guilty of a definite specific act of negligence which could not have been foreseen or anticipated by the plaintiff and which directly resulted in an injury to him, it could not be said that plaintiff had assumed the risk which caused the injury." *Schiano* v. *McCarthy Freight System, supra,* 65 A. 2d at 465. The court decided that the Superior Court did not err in refusing to instruct on assumption of risk.

In *Shine* v. *Wujick,* 89 R.I. 22, 150 A. 2d 1 (1959), plaintiffs, passengers in defendant's automobile were injured when defendant fell asleep at the wheel. The jury was instructed on assumed risk and contributory negligence. There, as here, plaintiffs' counsel did not object to the form of the charge, which therefore became the law of the case, nor did plaintiffs' counsel object to the mere giving of any instruction on assumed risk as the present petitioner's counsel did.

After verdict for the defendant, the Rhode Island Supreme Court granted plaintiffs a new trial, not on the ground that the trial court erred in merely giving an instruction on assumed risk, but on the ground that the evidence preponderated against the verdict on all issues including negligence, contributory negligence and assumed risk.

When facts comparable to those in the case under consideration have been crystallized into judicial rule in the state where the cause of action arose, there is a governing rule which the federal court must follow. *Venuto* v. *Robinson,* 118 F. 2d 679, 682 (3 Cir. 1941), cert. den. *C. A. Ross, Agent, Inc.* v. *Venuto,* 314 U.S. 627 (1941). In the absence of such a decision the *Erie* doctrine requires that the court "seek to make an enlightened guess" as to the law of the state, taking guidance and illumination from the state decisions on the subject. *Necaise* v. *Chrysler Corp.,* 335 F. 2d 562, 568 (5 Cir. 1964); *Connecticut General Life Insurance Co.* v. *Breslin,* 332 F. 2d 928 (5 Cir. 1964). See *Russo* v. *Merck & Co., Inc.,* 138 F. Supp. 147 (D.C. R.I. 1956); *Pastorelli* v. *Associated Engineers, Inc.,* 176 F. Supp. 159, 164 (D.C. R.I. 1959) in which the district court sought to make an "informed prophecy" based upon the decided cases as to how the Rhode Island Supreme Court would decide questions not precisely presented in those cases.

It is clear that where no state law dealing with the precise point arising in a federal court has been cited to the Court of Appeals and the Court of Appeals is uncertain how state courts would rule on the subject, the Court of Appeals may only decide whether the district judge reached a permissible conclusion in his determination of local law. *Jamaica Time Petroleum, Inc.* v. *Federal Insurance Co.*, 366 F. 2d 156 (10 Cir. 1966), cert. den. 385 U.S. 1024 (1967); *Lee Shops, Inc.* v. *Schatten-Cypress Co.*, 350 F. 2d 12 (6 Cir. 1965), cert. den. 382 U.S. 980 (1966); *Williams* v. *Tillett Brothers Construction Co., Inc.*, 319 F. 2d 300 (6 Cir. 1963), cert. den. 375 U.S. 888 (1963), reh. den. 375 U.S. 949 (1963).

The rule is not otherwise in the Supreme Court. See *Henderson Co.* v. *Thompson*, 300 U.S. 258 (1937).

The concept of assumption of risk is inseparable from the facts to which it is to be applied. There was evidence here that the plane crashed 3½ miles from the approach end of the runway, some 2¾ miles from the point where the pilot would be compelled to make a decision whether to land or to execute a missed approach procedure depending on whether he had visual contact with the ground; that the pilot who was flying was competent and experienced; that the plane was a dual control plane whose controls were accessible to both pilot and passenger; that the passenger Goldstein was a pilot with four or five months' training, of sufficient competence to make a solo flight to New Haven under visual flight rules, who knew that the flight must be made under instrument flight rules, who was with Chartier on the day of the accident when Chartier had to execute a missed approach at New Haven, who was present when Chartier was informed before leaving Bridgeport that weather at Providence was "partial obscuration, ceiling 500 broken, 1000 overcast, visibility 1, light rain and fog," and who might be inferred to have known all facts known to

Chartier; that the altimeter of the plane functioned abnormally over Norwich, Connecticut, at 6:09.30 p.m.; that Chartier was wholly without memory of events from the time he left Norwich, the crash occurring at about 6:30 p.m. and that there was no direct evidence concerning the cause of the crash.

It is not the respondent Chartier's position that the decedent, as a matter of law, assumed the risk of a crash due to the weather conditions, to a structural defect (the faulty altimeter) or exercises of judgment by the pilot not amounting to negligence (not returning to Bridgeport or going on to Boston). On the contrary, it is submitted that it was not inconsistent with any decision of the Supreme Court of Rhode Island to permit the jury to determine under strictly controlled circumstances whether "decedent consented to and accepted the substantial factors upon which a res ipsa case might be predicated excluding in this regard negligence of the decedent" as the Court of Appeals held, taking into account the permissible inference that Goldstein knew all facts known to Chartier.

The Court of Appeals did not refuse to follow the law of Rhode Island; on the contrary, it approved the trial judge's application of Rhode Island law to the facts before him and in doing so made no decision inconsistent with decisions of the Rhode Island Supreme Court on assumption of risk.

In conclusion, the Court of Appeals did not follow what petitioner terms "its own *Swift* v. *Tyson* version of the applicability of res ipsa," but expressly declined to pass on that question. After quoting the statement of Chief Judge Tuttle, dissenting in *United States* v. *Johnson,* 288 F. 2d 40, 45 (5 Cir. 1961) that crashes may be due to many causes other than negligence of the pilot, the Court of Appeals said that the trial court might well have considered ruling that this was not a proper case for the appli-

cation of res ipsa. One of the necessary elements for application of the Rhode Island doctrine of res ipsa loquitur was lacking, namely that the accident be one that would not ordinarily occur in the absence or negligence of the defendant.

POINT II. THE PETITIONER, WHO CLAIMED NO ACTUAL PREJUDICE TO HIM FROM THE MANNER OF SUMMONING THE JURORS OR IN THE ORDER IN WHICH JURORS WERE CALLED FOR IMPANELLING, FAILED TO SUSTAIN THE BURDEN OF PROVING DISCRIMINATORY PRACTICES IN THE SELECTION OF THE JURY BY A METHOD WHICH HAS NOW BEEN DISCONTINUED.

It is settled that it is only when a defendant has been deprived of his right to a jury representing a cross-section of the community that the Supreme Court does not require a showing of specific prejudice to him in the selection of a jury.

Ware v. *United States,* 356 F. 2d 787 (C.A. D.C. 1965), cert. den. 383 U.S. 919 (1966).

Ballard v. *United States,* 329 U.S. 187, 195 (1946).

Thiel v. *Southern Pacific Co.,* 328 U.S. 217 (1946).

See *Witherspoon* v. *Illinois,* 391 U.S. 510, 517, 531 (1968).

The petitioner claimed no specific prejudice to have resulted from the method of selecting the jury in the present case. He had the burden of proving purposeful or neglectful exclusion of an identifiable group from jury service. *Whitus* v. *Georgia,* 385 U.S. 545, 550 (1967); *Swain* v. *Alabama,* 380 U.S. 202, 208 (1965); *Thiel* v. *Southern Pacific Co., supra.*

The clerk of the United States District Court was asked why certain questions were included in the questionnaires sent to prospective jurors in addition to those calling for information about the qualifications of jurors under 28 U.S.C. § 1861. He replied:

> "Principally to make it convenient for both the court and the person questioned as to their being summoned. For instance, if a person, a female, returns a questionnaire in which she indicates she is the mother of five small children, the commission feels that it would be an expense to the Government to begin with and an inconvenience to her and an inconvenience to the Court to bring some person like that in."

He gave as another example of a person who would probably ask to be excused a woman whose husband was an attorney employed in the Department of Justice. Questionnaires when returned were approved or disapproved in conformity with the statute (741a). There was no systematic exclusion of any group because of race, religion or economic status. Women were not excluded. There was no systematic exclusion of any group (751a).

It can hardly be argued that the former practices of the United States District Court with respect to the summoning of jurors described in the foregoing testimony of the clerk resulted in the systematic intentional or neglectful exclusion of any identifiable economic, social, religious, racial, political or geographical group of the community. It was, therefore, not violative of petitioner's constitutional or statutory rights.

The fanciful argument is made that the calling of jurors for impanelling in the alphabetical order of their family names is likely to produce a jury that does not represent a fair cross-section of the community. It is submitted that

the petitioner's burden of proof requires more of him than the mere assertion that most persons whose names begin with "O" are "Catholic Irish" and that those whose names begin with "G" are "persons of Jewish descent." Nothing is more a matter of chance than the first letter of a man's family name and this letter does not place him in any economic, social, religious, racial, political or geographical group of the community.

The practices described in the testimony of the clerk of the District Court are no longer followed since the effective date of the Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53 and the amendments to 28 U.S.C. §§ 1861-1865 relating to qualification, exemption, exclusion and manner of drawing jurors. It was not for this reason, however, that the Court of Appeals, while disapproving the alphabetical listing of jurors for impanelling, unanimously refused to give the petitioner a new trial on this ground. The court found no danger of ultimate unrepresentative selection and no likelihood of general prejudice such as was present in *Ballard, supra.*

Ballard v. *United States, supra,* and *Thiel* v. *Southern Pacific Co., supra,* were decided under the supervisory power of the Supreme Court of the United States over lower federal courts and not avowedly as an announcement of constitutional doctrine. *Crawford* v. *Bounds,* 395 F. 2d 297 (4 Cir. 1968). In those cases which concerned an alleged systematic exclusion of an identifiable group (women jurors in *Ballard,* a large group of wage earners in *Thiel*) there were "class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." *Thiel* v. *Southern Pacific Co.,* 328 U.S. 217, 220 (1946) which the Supreme Court was called upon to exercise its supervisory power to eliminate. Cf. *Glasser* v. *United States,* 315 U.S. 60 (1942).

The petitioner, who showed no specific prejudice, did not sustain his burden of proving discriminatory practices in the manner of selecting the jury and, therefore, makes no case for the exercise of the supervisory power of the Supreme Court to reflect its views of good policy in the selection of juries.

Conclusion.

The Court of Appeals did not refuse to apply Rhode Island law but, on the contrary, applied the general principles of existing Rhode Island law to the special facts before it. Therefore, no question is presented as to the constitutionality of the Court of Appeals' decision.

The petitioner claimed no special prejudice to have resulted to him from the manner of selecting the jury and failed to sustain his burden of proving discriminatory practices which were likely to result to the general prejudice in the impanelling of juries which did not fairly represent a cross-section of the community. Therefore the Court is not called upon to exercise its supervisory power over a lower federal court.

Prayer.

This respondent prays that the petition for certiorari be denied.

Respectfully submitted,

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